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No. 81-2376

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ORVILLE R. MERTZ and
McGRAW-HILL, INC.,

Petitioners,

v.

WILLIAM A. DENNY,

Respondent.

On Writ of Certiorari
to the Supreme Court of the
State of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Statement Involved In This Case Is Not Of The Type For Which The First Amendment Affords Constitutional Protection.

This case involves a feature story, developed by McGraw-Hill over a period of several weeks, about how Mertz was deposed as manager of a corporation.

Mertz, after learning that Denny was one of those interviewed for the story, called the reporter to raise question about Denny's credibility and reputation. In the course of that telephone conversation, he made a statement about Denny which the Wisconsin Supreme Court has found was not true. At page 663 of its decision, it said:

> We accordingly hold that Mertz's statement could have been understood by reasonable people in the community in a defamatory sense, and, insofar as it conveyed the impression that Denny[1] had been fired, was not true.

The infirmities of false statements of fact were recognized in Gertz v. Robert Welch, Inc., 418 U.S. at 340:

* * *

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public

---

[1] Reproduced in the Appendix to this brief are excerpts of the deposition testimony of Mertz and the McGraw-Hill reporter relating to the telephone conversation in which Mertz made the false statement about Denny.

issues. New York Times Co. v. Sullivan, 376 U.S., at 270. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Later, it was said in the concurring opinion of Justice Paul in Cox Broadcasting Corp. v. Cohn, 420 U.S., at 499:

> In Gertz we held that the First Amendment prohibits the States from imposing strict liability for media publication of allegedly false statements that are claimed to defame a private individual. While providing the required 'breathing space' for First Amendment freedoms, the Gertz standard affords the States substantial latitude in compensating private individuals for wrongful injury to reputation. '(S)o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.' 418 U.S., at 347.
>
> * * *

The Wisconsin Supreme Court, after carefully considering Gertz and the decisions of this Court which followed it, and, after

finding that Mertz's statement to the reporter was not true, has remanded this case for trial. In its decision, it has directed that at trial determinations be made as to:

- whether the media defendant was negligent in broadcasting or publishing a defamatory statement (106 Wis. 2d at 658);
- whether Denny can prove actual malice so as to be entitled to punitive or presumed damages from McGraw-Hill (106 Wis.2d at 659);
- whether Mertz's statement was defamatory (106 Wis.2d at 662); and
- Mertz's liability, if any, according to the common law of defamation in Wisconsin (106 Wis.2d at 661).

II. Because The Wisconsin Supreme Court Has Remanded This Case For Trial, It's Decision Is Not Final "As An Effective Determination Of The Litigation." Therefore, For The Reasons Recently Stated By This Court In O'Dell v. Espinoza, The Petition Should Be Dismissed For Want Of Jurisdiction.

In John O'Dell, et al v. Andrew Espinoza, et al, 102 S.Ct. 1865, 72 L.Ed. 2d 237 (1982), this Court, in a per curiam

opinion, said:

> Under 28 U.S.C. sec. 1257, this Court has jurisdiction to review only '(f)inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation.' Market Street R.Co. v. Railroad Commission, 324 U.S. 548, 551. Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

The decision of the Wisconsin Supreme Court for which petitioners seek certiorari also is not final "as an effective determination of the litigation." The Wisconsin Supreme Court has remanded the case for trial. Depending upon what the jury finds on the issues of malice or reckless disregard of the truth, the verdict may even render moot the questions presented in the petition.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the writ of certiorari to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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EXCERPTS FROM DEPOSITION OF
ORVILLE R. MERTZ TAKEN ON
May 7, 1979

Page

3 Q. Mr. Mertz, would you please state your name and address for the record?
A. Orville Mertz, 4217 Buchanan, B-u-c-h-a-n-a-n, Road, Oconomowoc, 53066.

***

9 Q. Now, when was the first time that you heard Mr. Santry's name?
A. I think when he left a message for me to call him, probably early in December.
Q. But in any event, after December 5th?
A. Yes.
Q. When did you cease occupying your office at Koehring, the physical office, your desk, your chair, et cetera?
A. Some time in January, I would guess. Now, this is an approximation.
Q. Of course. Did Mr. Santry call you at the Koehring office, or did he call you at home the first time?
A. He called me at both places. He called me at the office and left

messages, and he called me at home and left messages. He called my wife at home and asked when I would be there. He tried to make an appointment to call me.

10 Q. And did you answer any of the messages?

A. No. As a matter of fact, when she said I would be home, I arranged to be gone; so I avoided talking to him.

Q. Did you know what subject matter he was calling you about?

A. I had heard that he was doing an article on Koehring -- this was part of the message that I had gotten -- in Business Week, and I just didn't want any part of communicating with him.

***

11 Q. And did you return his call, or did he eventually call you?

A. He caught me at home early in the morning, I was having breakfast, the telephone rang, and I answered it. And he said, "This is Mr. Santry of Business Week," and I said, "Yes." He said, "I'm writing a story about Koehring, and I've interviewed fourteen or fifteen different people, and I would like you to verify some facts for me."

11 Q. Did he say -- He must have mentioned the names, at least some?
A. Later on in our discussion he did mention some names, and that's the way he kind of trapped me into talking to him because at that point my concern was that he wanted me to verify some facts. Okay, I'll screen those and see what is fictional and what is fact.

***

62 Q. Now, on the same day you called Mr. Santry back, did you not?
A. Very quickly thereafter. I thought to myself and said to my wife, you know, there are so many things that are alleged that are biased here, and there is a one-sided viewpoint. So many things have been alleged by Bill Denny, I wondered whether Santry really got a view of Denny's relationship with Koehring Company through which to filter his comments.

***

63 Q. When you say you wanted him to screen that information in view of Mr. Denny's work at Koehring Corporation, what did you think Mr. Denny's work at Koehring had to do with screening his comments?

63 A. Mr. Santry could answer that, and he did, and he said the views of former employees are always suspect.

***

65 Q. You can, of course, refresh your recollection from the notes. Do you think that Mr. Denny was telling some untruths about you?

A. Mr. Denny used innuendoes and allegations and raised questions that would imply things that actually were not true.

Q. This is what you believed?

A. This is what I believed and what I think is factual. He sought out information that would raise questions in the minds of people about the integrity of the management and me particularly or the capacity of us to manage correctly. There were many, many allegations or implications or questions raised that would, by raising the question, create a doubt.

Q. Did Mr. Denny raise questions about your integrity or about your ability?

A. I judged it to be both but more perhaps performance than integrity or

65 ability.

Q. And after you hung up the phone at the end of the first forty-five minute conversation with Mr. Santry, you had second thoughts saying Santry might be paying too much attention to Denny?

66 A. And to all the dissidents. I felt like I was the only one of the non-dissidents he had talked to. That was the feeling he created in me. I'm sure that was wrong, but that's the feeling I got.

Q. Yes.

A. I think he's an expert interviewer, and that's why I got that feeling, you see. I think he's a pro.

***

71 Q. You called him back and said in sum and substance, Mr. Santry, before you pay attention to -- there must be a better word than that -- before you give credibility to Mr. Denny's statements, why don't you check out his reputation, correct?

A. Okay.

Q. And at that time you believed, did you not, that in checking out Mr. Denny's reputation Mr. Santry might

71 not pay as much attention to Mr. Denny's statements than he might have without doing so; isn't that a fact?

A. I would accept that.

Q. And then at the same time you discussed your personal relationship with Mr. Denny, which involved Mr. Denny leaving Koehring?

72 A. Correct.

Q. And from your conversations -- excuse me -- and in your conversations, you conveyed to Mr. Santry that Denny's termination at Koehring had been under adverse circumstances, as you viewed them, did you not?

A. I said that we had circumscribed his work, that we had restricted his work, that I made it clear he wouldn't be a vice president and general counsel, that his services were really terminated, with all this background.

***

Q. Did you tell Mr. Santry Mr. Denny had resigned?

A. No.

***

80 Q. Going to the resignation, the time period between when Mr. Denny, according to you, came in and said he wanted to leave and the time when he actually

resigned, was about four months or so?

A. Probably four or five months.

Q. And during that time, you and Mr. Denny were on friendly terms?

A. Oh, sure.

***

EXCERPTS FROM DEPOSITION OF
DAVID G. SANTRY TAKEN ON
JUNE 28 and 29, 1979

Page

3 Q. Please state your name and address for the record.

A. David G. Santry, 35 West 64th Street, New York City 10023.

***

4 Q. What is your job title at Business Week? Reporter?

A. When I was hired I was assistant management editor.

Q. Maybe you can run through your career in Business Week.

A. Assistant management editor for six months. Then I was made a contributing editor in May of '74.

Then the title contributing editor was changed to staff editor. Essentially the same thing.

5 And I stayed in that job until July of '77 when I was made editor of the Inside Wall Street Department, and I write a weekly column on Wall Street now.

Q. From December of '75 through the Spring of '76, you were the contribu-

5 ting editor, correct?

A. Correct.

Q. What were your assignments, your tasks? Describe your job.

A. Writing, reporting and editing stories for the management department.

Q. Didn't you have your own byline?

A. No, it's group journalism.

Q. How many assignments do you have per week, let's say?

Do you work upon ten projects? Five projects?

A. No, I try to have some ideas and be working on them here and there. But I -- usually one story would be working on, you know, that would go into the magazine.

I worked for another fellow at this point.

***

6 Q. Maybe you can start with, when was the first time that you ever learned about the situation at Koehring that eventually led to Mr. Mertz's departure?

A. On December 5, 1975 I read a Dow Jones -- an item on the Dow Jones tape, that Mertz had resigned and he said he did it to end the turmoil at Koehring.

***

6 Q. And so you saw the Dow Jones tape. What made you investigate it further, in pursuing this story?

A. Mertz's statement.

Q. Was that of general interest to the business community as far as you were concerned?

A. Yes.

***

8 Q. Going through the chronology, there is a suggestion made to call on somebody named Robert Baird.

And you did that, did you not?

A. Yes.

Q. Who did you call and what time?

A. I believe the fellow's name is Crandall Hayes, and Mr. Hayes suggested I call William Denny.

***

9 Q. Did you call Mr. Denny?

A. Yes.

Q. Do you recall on what date?

A. No. It was soon after the Fifth.

Q. What is your best recollection of your conversation with Mr. Denny?

10 A. I think he said: I'll send you some newspaper clips, and I think he filed suit against Koehring.

10 And he was going to send me the papers on the suits and a bunch of letters he had written to directors and so forth, trying to get minutes of directors' meetings.

***

28 Q. Mr. Santry, could you explain what happens at Business Week? How does the story end up from the document which is marked as Exhibits 4-1 to the final story, which is Exhibit 1?

A. All right. I write the story, and I submit it to Burgen, who is the management editor.

Then he would read it, and if he had any questions we would go over it, and he might do some editing.

Then from him it went to Gordon Williams, the first reader here. He's a senior editor, and he also reads it and does some editing.

Q. In this case did Mr. Burgen suggest some changes or some verification of facts or some more work on your part?

A. Yes.

Q. What did he ask you to do?

A. I think he regrote the lead. As a matter of fact, in this draft -- can I go off the record a minute?

***

29 Q. Did Mr. Burgen ask you to verify any facts in your story?
A. I can't recall.
Q. Did Mr. Williams ask you to verify any facts --
A. I can't recall.

***

43 Q. Was your last interview with any of your sources December 30th of 1975?
A. Yes.

***

Q. Were you done with your fact gathering now on December 30th of '75?
A. Yes.
Q. Was there some deadline set on your story as to when it had to be in final form?
A. I can't remember when it was scheduled for.

***

52 Q. What was the basis for your statement in Exhibit 1, the article, that Mr. Denny had been fired in 1969?
A. The conversation that I had with Orville Mertz.
Q. Could you give me your best recollection, you may refresh your recollection with your notes, if you want, Exhibit 3, as to what you believe Mr.

52 Mertz told you, and what questions you posed to him.

53 A. Mr. Mertz proferred the information. We had one interview.

I called him. I finally got a hold of him after trying innumerable times, and I finally got hold of him the morning of December 30th.

I asked him a lot of questions about his tenure and so forth, and that interview concluded.

He called me back later that day; specifically to say that I should weigh carefully anything Denny said about him, and he said that he had terminated Denny in 1969.

He gave some reasons; that Denny was litigious, he lacked judgment, he never settled any cases, he cost them money, and he was a disaster to have around.

Q. Mr. Mertz to the best of your recollection, he used the word "fired" or "terminated" or don't you recall?

A. "We terminated him."

***

57 Q. During either conversation, did Mertz also describe Mr. Denny's role

57 in Mr. Mertz's ouster?
A. Yes.
Q. What did he say in respect to Mr. Denny about that?
A. May I refer to my notes?
Q. Please do. I wish that you would refer to them as much as you think that you have to.
A. He refers to Denny as the spearhead of this -- of the campaign to oust him. He said that Denny was personally highly active in this campaign.
Q. I thought that you were referring to your notes?
A. Yes.
Q. From the conversation with Mr. Mertz, did he agree that there was some cause of the complaints brought by the dissidents?
A. Mertz was a very clever --
MR. HAMMOND: Objection, it's not responsive and it's a characterization.
Q. I would like to know what was your impression of the conversation.
MR. HAMMOND. I still object.
58 The question was: What did he say? And that is what is should be limited to.
A. Mertz had explanations for all of

58 screw-ups during his tenure.

MR. HAMMOND: Same objection, and I move that that be stricken.

***

59 Q. Mr. Santry, what was your reason for using the word "fired" in your article which is Exhibit 1, as compared to "terminate"?

A. It's a good, strong, active verb.

Q. It's a good, strong, active verb as compared to terminate, which is a less sort --

A. That is a corporate euphemism, and as a writer I want strong, taut prose.

60 Q. Mr. Santry, your last conversation with any of the interviews, is the second conversation with Mr. Mertz; is that correct?

A. I believe so.

Q. Did any of your editors question whether or not the word "fired" should be used in that article?

A. No.

Q. Did you try to verify that fact with anybody else after the second conversation with Mr. Mertz?

A. No.

***

60 Q. Did you try to verify after your second conversation with Mr. Mertz whether or not Mr. Denny, in fact, had been fired?

A. No.

***

62 Q. Did Mr. Mertz himself state anything about Mr. Denny's reputation?

A. He said something to the effect that he was not held in the highest regard amongst members of the Milwaukee bar.

Q. Did you ask him the question as to Mr. Denny's reputation, or how did that statement come about?

A. This was all proffered by him in the second telephone conversation.

Q. The second telephone conversation was initiated by Mr. Mertz; is that correct?

A. Correct.

Q. Did he state what was the reason for him calling you?

63 A. As I said before, he wanted me to know that I should weigh carefully what Denny had said about him.

Q. Did you have any reason to disbelieve any of the facts that Mr. Denny had told you?

A. No.

63 Is that the reason why you did not check his reputation as suggested by Mr. Mertz?

A. Yes.

Q. Had any of the people whom you had called, and that would include Hill, Miller and Harsh, had any of them said that Mr. Denny had been fired?

MR. HAMMOND: I am going to object to the question on the same basis as I previouslv did. The witness may answer.

MR. RITERIS: Will his answer include Hill, Miller and Harsh?

MR. HAMMOND: Read the question back to me, please.

(Question read)

A. No.

Q. Or terminated?

A. No.

****